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No. 90-1952

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALAN W. FINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in a federal prosecution that resulted from an investigation conducted by both state and federal agents, state law should govern the admissibility of evidence obtained by state officers in violation of state law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 929 F.2d 765.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1991. The petition for a writ of certiorari was filed on June 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of conspiracy to distribute

and to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 846 (Count 1), three counts of distributing cocaine (Counts 2, 4, and 5), and one count of distributing marijuana (Count 3), all in violation of 21 U.S.C. 841(a)(1), and two counts of tax evasion, in violation of 26 U.S.C. 7201 (Counts 6 and 7). He was sentenced to concurrent terms of imprisonment of 12 years each on Counts 1, 2, 4, and 5, and five years each on Counts 3, 6, and 7. He was also sentenced to two years' special parole on Count 3. The court of appeals affirmed. Pet. App. 1a-30a.

1. Between January 1985 and July 1986, state and federal law enforcement officers conducted an undercover investigation into cocaine and marijuana trafficking by a group consisting of petitioner, Dianne Sutherland, and petitioner's brother, Henry Fini. In July 1986, petitioner, Sutherland, and others were charged in Hampden County, Massachusetts, Superior Court with several narcotics offenses. The investigation that led to those indictments produced a number of tape recordings of meetings between an informant, Gary Forish, and the defendants, in which the defendants made incriminating statements about their drug dealing. Pet. App. 2a-3a.

Under Massachusetts law, the warrantless interception of oral and wire communications is prohibited absent the consent of all parties, and the Commonwealth conceded in its prosecution of petitioner that the tape recordings were inadmissible in its case-in-chief. Before trial, the Commonwealth sought a ruling that it could use the tape recordings as impeachment evidence in the event petitioner chose to testify, but the Supreme Judicial Court ruled that the recordings were inadmissible for any purpose. Pet.

App. 35a-42a. On September 5, 1989, upon motion of the Commonwealth, the charges against petitioner were dismissed. Pet. App. 3a.

2. On November 1, 1989, a federal indictment was returned against petitioner, Sutherland, and a third defendant who was later acquitted. Petitioner moved to suppress the tape-recorded conversations, arguing that their use, after a Massachusetts court had declared them inadmissible, violated due process. The district court rejected that claim, Pet. App. 33a-34a, and petitioners were convicted of the federal charges.

3. The court of appeals affirmed, finding no error in the admission of the tape recordings. The court began with the principle that federal law governs the admissibility of evidence in a federal prosecution, and noted that the parties were in agreement that the recordings had been obtained in compliance with the federal wiretap statute, 18 U.S.C. 2510 *et seq.* Pet. App. 4a-5a.

The court of appeals discussed a possible exception to the general rule, which had been suggested in some of its own prior decisions and in a Second Circuit case, *United States* v. *Sotomayor*, 592 F.2d 1219, 1225, cert. denied, 442 U.S. 919 (1979). The exception would provide for suppression in a federal case of evidence that was obtained as a result of a flagrant abuse of state law by state officials. Pet. App. 7a-8a. At the outset, the court of appeals rejected the application of such an exception in this case on factual grounds, noting that there was sufficient federal involvement in this investigation to justify the admission of the evidence "because the federal officer had authority to do lawfully exactly what the state officers had done unlawfully." Pet. App. 6a. The court then went on to clarify its previous dicta

and to hold that it would consistently apply the simple rule that "in federal criminal prosecutions, the admissibility of wiretap evidence is a question of federal law." Pet. App. 8a. The court of appeals pointed out that its position was consistent with a recent Second Circuit decision, *United States* v. *Pforzheimer*, 826 F.2d 200 (1987), in which that court had apparently repudiated the dictum in *Sotomayor*. Pet. App. 8.

ARGUMENT

Petitioner contends that the court of appeals was in error when it held that evidence seized in violation of state law may be introduced in federal court if federal law allows its admission. He alleges a conflict between the decision below and decisions of the Second, Fourth, and Ninth Circuits. In fact, the courts are in agreement that evidence admissible under federal law cannot be excluded simply because it would be inadmissible in a state court.

At the outset, petitioner's claim fails because, as the court of appeals pointed out, any suggested exception to the principle that federal law applies in a federal prosecution is limited to those cases in which federal officers were not involved in the investigation and state officers, acting independently and in violation of their own State's laws, have thereafter turned the case over to federal authorities and given them the illegally seized evidence. In this case, however, the court of appeals determined that there was considerable federal involvement in the investigation. The DEA provided funds to the informant for the purchase of drugs, the tape recordings were turned over to the DEA for duplication and safekeeping,

United States Marshals seized automobiles belonging to petitioner for forfeiture under federal laws, and the IRS was conducting a parallel investigation at the time the State was pursuing its case. Pet. App. 6a. In these circumstances, it was entirely appropriate for the court to admit the evidence, because the evidence was the product of a joint federal-state investigation that was conducted in full compliance with federal law. Pet. App. 6a; see *United States* v. *Aiudi*, 835 F.2d 943, 946 (1st Cir. 1987), cert. denied, 485 U.S. 978 (1988).

Even if this case had been one in which state officials acted on their own and referred the case to federal authorities only after their own prosecution had foundered, there is no support for petitioner's contention that state law should apply in the federal proceeding. This Court's decisions are consistent with the ruling of the court of appeals. For example, in *Olmstead* v. *United States*, 277 U.S. 438 (1928), the question was whether evidence obtained by federal officers in violation of state law was admissible in a federal prosecution. The Court held that federal law applies, noting the importance of uniformity in evidentiary rules in the federal courts. *Id.* at 469. Similarly, in *Elkins* v. *United States*, 364 U.S. 206 (1960), the Court addressed the question whether evidence obtained by state officers should be admitted in a federal proceeding. The Court held that "[t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at 224. Finally, in *Preston* v. *United States*, 376 U.S. 364, 366 (1964), this Court stated that "[t]he question whether evidence obtained by state officers

and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers."

Petitioner relies on the Second Circuit's decision in *United States* v. *Sotomayor*, *supra*, and argues that that case held that more stringent state standards should apply to the admission in a federal case of evidence gathered from a wiretap conducted by state officers. Pet. 14. As the court of appeals in this case observed, however, the language in *Sotomayor* relied upon by petitioner was dictum, and more recent decisions of the Second Circuit have rejected the proposition that state law should apply to restrict the admissibility of evidence in a federal prosecution.

In *United States* v. *Pforzheimer*, 826 F.2d 200 (1987), the Second Circuit directly addressed the question whether a more restrictive state constitutional provision should apply to exclude evidence in a federal prosecution, when state officers obtained the evidence with no participation by federal agents. The court concluded that in light of this Court's decisions on the subject, "federal law is applicable in a federal prosecution even when there has been state involvement in the case." 826 F.2d at 203.

The Second Circuit explicitly rejected the dictum of *Sotomayor* in a later case, *United States* v. *Rowell*, 903 F.2d 899, 902 (1990). There, the court referred to the suggestions from *Sotomayor* and other Second Circuit cases that more stringent state laws should govern and said that "this argument was considered and rejected in *Pforzheimer*." The Second Circuit's position on this issue is therefore the same as that of the court below.

Petitioner also claims that Fourth and Ninth Circuit decisions conflict with the decision below, but

that contention is also incorrect. In *United States* v. *Chavez-Vernaza*, 844 F.2d 1368 (1987), the Ninth Circuit specifically joined the Second Circuit's view in *Pforzheimer*. The court there noted the consensus among the courts on this issue and concluded (844 F.2d at 1374):

> We agree with the Second and Third Circuits that requiring federal district courts to look to state law when determining the admissibility of evidence obtained in accordance with federal law would hamper the enforcement of valid federal laws and undermine the policy favoring uniformity of federal evidentiary standards. We also find no justification for excluding evidence illegally seized by state officials acting independently of federal officials while admitting such evidence in cases in which federal involvement is present.

Petitioner claims a conflict with the Ninth Circuit's decision in *McGuire* v. *Estelle*, 902 F.2d 749 (1990), cert. granted, 111 S. Ct. 1071 (1991). But that case involved a conviction in state court; the court of appeals held on habeas review that the state court erred in admitting prejudicial "other crimes" evidence against the defendant and that the error denied the defendant a fair trial. Nothing in the court's decision in that case suggests that evidence should be excluded from a federal prosecution simply because it would have been subject to exclusion in a state prosecution had it been offered in any such proceeding.

The Fourth Circuit has likewise held that regardless of the extent of the involvement of state officers in the investigation, the admissibility of evidence in a federal prosecution depends entirely on federal law. *United States* v. *Glasco*, 917 F.2d 797 (1990), cert. denied, 111 S. Ct. 1120 (1991). Petitioner cites

United States v. *Apple*, 915 F.2d 899 (4th Cir. 1990), in which the court held that federal authorities were required to state whether any illegal electronic surveillance had been conducted, including any wiretaps that were conducted by state authorities in violation of state law. But the court in that case clearly imposed the requirement on the basis of the provisions of the federal wiretap statute, which it read to require disclosure of wiretaps that violated either federal or state laws. *Id.* at 908-909. Nothing in the *Apple* decision contradicts the principle that federal law applies to the admission of evidence in federal prosecutions.

This case does not require the Court to consider the continuing validity of *United States* v. *DiRe*, 332 U.S. 581 (1948), where the Court held that in the absence of an applicable federal statute, the lawfulness of an arrest is determined by the law of the State where the arrest takes place. Regardless of whether that rule is still valid, it has never been extended to determine the lawfulness of searches. See *United States* v. *Rickus*, 737 F.2d 360, 364 n.2 (3d Cir. 1984) (holding that federal law governs validity of search warrant obtained in connection with joint federal-state investigation and observing that "this case does not require us to assess the validity of an *arrest* by state officers. Thus, we need not address the rule set forth in *United States* v. *DiRe*."). Several courts have suggested that *DiRe* may no longer be valid in light of the Court's decision in *Elkins* and the development of a federal common law governing the lawfulness of arrests. See *United States* v. *Porter*, 701 F.2d 1158, 1165 (6th Cir.), cert. denied, 464 U.S. 1007 (1983); *United States* v. *Miller*, 452 F.2d 731, 733 (10th Cir. 1971), cert. denied, 407 U.S. 926

(1972). That question is not presented in this case, however.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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